RECORD AND BRIEFS

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No. 16-499

IN THE
Supreme Court of the United States

JOSEPH JESNER, ET AL.,
Petitioners,

v.

ARAB BANK, PLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, AND THE AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are associations, many of whose member corporations have been named as defendants in cases involving the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350:

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It has 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to express its members' views in matters before Congress, the Executive Branch, and the courts, including this Court.

The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.

USA*Engage is a broad-based coalition representing organizations, companies, and individuals from all regions, sectors, and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local level. Established in 1997, USA*Engage seeks to inform policymakers, opinion-leaders, and the public

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

about the counterproductive nature of unilateral sanctions, the importance of exports and overseas investment for American competitiveness and jobs, and the role of American companies in promoting human rights and democracy worldwide.

The United States Council for International Business is a business advocacy and policy development group representing 300 global companies, accounting firms, law firms, and business associations. It is the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers, and the Business Industry Advisory Committee to the Organization for Economic Cooperation and Development.

The American Petroleum Institute ("API") is a national trade association with 625 corporate members that represents all aspects of America's oil and natural gas industry, including producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API's mission is to promote safety across the industry globally and to influence public policy in support of a strong, viable U.S. oil and natural gas industry. API negotiates with regulatory agencies, represents the industry in legal proceedings, participates in coalitions, and works in partnership with other associations to achieve its members' public policy goals.

Amici unequivocally condemn terrorism. This case, however, does not turn on an assessment of that clearly abhorrent practice, but, rather, presents a specific legal question concerning the scope of the ATS and federal common law—namely, whether fed-

eral courts can recognize an ATS action under federal common law against corporate entities.

Amici have a substantial interest in the legal question presented in this case. Their members transact business around the world, and many of them—based on nothing more than doing business internationally—have been targeted by plaintiffs suing under the ATS. In the past two decades, various plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations doing business in two dozen industry sectors, including agriculture, financial services, manufacturing, and communications. *See* Jonathan Drimmer & Sarah Lamoree, *Think Globally, Sue Locally: Trends & Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 460-62 & n.34 (2011). These lawsuits have maligned business activities in more than 60 countries as alleged human-rights abuses actionable in U.S. courts. *See id.* at 464. And they have had—and have the potential to create in the future—substantial adverse effects not just on the targeted businesses themselves, but on U.S. foreign policy and on the countries where the claims originate. In light of those adverse effects, *amici* have filed amicus briefs in numerous ATS cases, including *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), in which the question presented here was also presented (but not decided).

Amici's only interest in this case is to urge the Court to approve the specific legal rule the Second Circuit has adopted, and affirm that ATS suits do not reach corporations. That interest differs from the interests of either party in this case. *Amici* do not ascribe to petitioners' interpretation of the ATS

and federal common law, which would incorrectly authorize ATS suits against corporations. Nor do *amici*'s interests align with those of respondent. Respondent is accused of facilitating terrorism, which *amici* will not defend. Moreover, respondent has made alternative arguments that terrorism is not sufficiently well defined to fall within the ATS, Opp. 31-34, and that petitioners' claims fail for lack of causation, Opp. 34-36. *Amici* take no position on those questions in this case.

Amici accordingly submit this brief in support of neither party.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Alien Tort Statute ("ATS") provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that although the ATS itself is merely a jurisdictional provision, the statute authorizes federal courts, in very limited circumstances, to recognize a federal common law action to enforce a narrow set of international human-rights norms. *Id.* at 732.

But the Court also recognized in *Sosa*, and again in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"), that given the burdens of ATS cases, as well as their potential for interference with U.S. foreign policy and the lack of any congressional guidance as to their scope, federal courts should proceed with "great caution" not only in recognizing any common law cause of action, but in de-

termining its scope. *Sosa*, 542 U.S. at 728; *see Kiobel II*, 133 S. Ct. at 1664. Specifically, the Court explained that a court may not recognize an ATS cause of action unless two prerequisites are satisfied. *First*, the relevant international norm invoked must be sufficiently definite and universally recognized to qualify as one of the "very limited category" of norms even potentially enforceable under the ATS. *Sosa*, 542 U.S. at 712, 729-30. *Second*, even if that threshold requirement is satisfied, courts should not recognize an ATS action unless it is appropriate under principles of federal common law, which require courts to exercise "great caution," *id.* at 728, and to reject private actions to enforce international norms except in the rarest of circumstances.

Applying this framework, this Court should refuse to imply a federal common law action to enforce international human-rights norms against corporate entities. Corporate liability is not a given under federal common law. *See, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (no corporate liability for implied *Bivens* actions). Rather, under principles of federal common law generally, and under *Sosa* and *Kiobel II* in particular, the Court must consider whether federal common law *should* recognize such an action, consistent with its instruction in *Sosa* that courts approach the question whether to recognize an implied right of action for ATS claims with "great caution." 542 U.S. at 728; *see id.* at 732 n.20 (court recognizing federal common law action under ATS must determine "whether international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*, if the defendant is a private actor *such as a corporation* or individual" (em-

phasis added)); *Kiobel II*, 133 S. Ct. at 1665 (defining scope of an international-law-based cause of action includes determining "specifying who may be liable").

In the context of ATS actions that seek to enforce international human-rights norms, the reasons for rejecting corporate liability are overwhelming. For one thing, international law itself rejects corporate liability for human-rights norms. The Second Circuit has persuasively explained that this by itself precludes recognizing a federal common law ATS action against corporations. *Sosa* held that courts may not recognize an ATS action unless the underlying international norm being invoked applies "to the perpetrator being sued," 542 U.S. at 732 n.20, and international law does not extend human-rights norms to corporations. That should be the end of the matter.

But even if this Court disagrees and concludes that corporate ATS liability is consistent with international law, there would still be no basis to recognize corporate ATS liability, because doing so would be inconsistent with basic principles of federal common law articulated in *Sosa* and *Kiobel II*.

As an initial matter, courts fashioning federal common law must be guided by the policies established in analogous congressional enactments. The relevant statute here is the Torture Victim Protection Act ("TVPA"), which was enacted by Congress to create an express cause of action *under the ATS*. In creating that cause of action, Congress determined that only natural persons could be liable, not corporations. *See Mohamad v. Palestinian Auth.*, 132 S.

Ct. 1702, 1705-06 (2012). This Court should apply the same policy to implied causes of action under the ATS and limit liability to natural persons. Courts crafting federal common law are bound to follow Congress's lead, and there is no basis to recognize corporate liability in this context, where Congress already has precluded it. Indeed, judicially recognizing such actions under the ATS against corporations would create an inexplicable and indefensible anomaly: *aliens* could bring actions alleging torture against U.S. corporations, but *U.S. citizens* could not sue U.S. corporations for torture under either statute.

The foreign policy and other practical consequences of recognizing corporate ATS liability confirm this point. For one thing, while ATS actions generally pose a risk of adverse foreign policy consequences, the history of corporate ATS actions demonstrates that corporate cases in particular are most likely to spark objections from foreign sovereigns and interfere with the foreign policy prerogatives of the political branches. ATS suits, moreover, are extraordinarily burdensome, and even completely meritless suits impose substantial and unjustified reputational, economic, and other burdens on corporate defendants. Such cases, in other words, "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). Indeed, these burdens help explain why Congress chose to limit analogous TVPA actions to natural persons. *Sosa* and *Kiobel II* likewise instruct courts to consider such consequences when delineating the scope of ATS ac-

tions under federal common law. And considering the consequences of allowing corporate ATS actions confirms that federal common law, like the TVPA, should target only natural persons for violations of international human-rights norms.

There is, in short, no basis for implying a federal common law cause of action under the ATS against corporations. The decision below correctly rejects corporate liability under the ATS and should be affirmed.

ARGUMENT

I. COURTS HAVE STRICTLY LIMITED AUTHORITY TO RECOGNIZE NEW FEDERAL COMMON LAW ACTIONS TO ENFORCE INTERNATIONAL HUMAN-RIGHTS NORMS UNDER THE ATS

A. Courts Must Exercise "Great Caution" In Determining The Scope Of The Federal Common Law Cause Of Action Under The ATS

1. The question in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), was whether this Court would adopt the view first announced by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the ATS allows alien plaintiffs to sue individuals for violations of modern international human-rights norms. The plaintiff in *Sosa* argued that the ATS itself creates a cause of action for violations of customary international law. In contrast, the United States argued that (i) the ATS is a jurisdictional provision only, and does not create a cause of action, and (ii) customary international law norms do not themselves create a cause of action unless Congress

expressly has enacted such norms into law and made them privately enforceable (as it did with the TVPA). *See generally* Br. for United States as Resp't Supporting Pet'r, *Sosa v. Alvarez-Machain*, No. 03-339 (U.S. Jan. 23, 2004).

The *Sosa* Court rejected the plaintiff's approach and held that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. But the Court further held that "history and practice" demonstrate that the First Congress "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations" that would have been seen as providing for personal liability under the general common law at the time: offenses against ambassadors, violations of safe conduct, and piracy. *Id.* at 714, 720. Although the Court acknowledged that there was no longer any *general* common law after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), it held that the ATS authorizes federal courts to recognize under *federal* common law a cause of action to enforce "a very limited category" of law-of-nations norms, *Sosa*, 542 U.S. at 712, 720, 726, 729-30, 732. In particular, the Court explained "that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"—i.e., offenses against ambassadors, violations of safe conduct, and piracy. *Id.* at 732.

Crucially, however, the Court also made clear that this threshold, international-law-based precondition was necessary but not sufficient for recogniz-

ing an ATS action under federal common law. *See id.* ("*Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350*, ... federal courts should not recognize private claims under federal common law" that do not satisfy rule of clear definition and universal acceptance (emphasis added)); *id.* at 738 n.30 (noting that the Court's "demanding standard of definition ... must be met to raise *even the possibility* of a private cause of action" (emphasis added)). Rather, the Court explained that federal courts must engage in "vigilant doorkeeping," and exercise "great caution" before recognizing federal common law actions under the ATS. *Id.* at 728, 729.

The claim in *Sosa* failed even to satisfy the threshold rule of clear definition and universal acceptance, *id.* at 738, so the Court had no occasion to articulate any further concrete federal common law limitations on ATS actions. The Court did, however, set forth general principles of federal common law that should guide courts' analysis of whether recognizing such an extraordinary action is appropriate.

The Court explained that judicial caution is warranted because its "general practice has been to look for legislative guidance before exercising innovative authority over substantive law," and "[i]t would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Id.* at 726. The Court also had "recently and repeatedly" stated that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," because the "creation of a private right of action raises issues beyond the mere consideration

whether underlying primary conduct should be allowed or not—entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* at 727. And, the Court emphasized, "the potential implications for the foreign relations of the United States of recognizing [private] causes" of action for violating international law "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*

2. The Court applied these principles in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*").

In holding that the ATS does not authorize actions for extraterritorial conduct, the Court reaffirmed that *Sosa*'s requirement of clear definition and universal acceptance is only a threshold requirement to recognizing an ATS action. Even if that precondition is satisfied, courts may not recognize an ATS action unless doing so is appropriate under the federal common law principles requiring "judicial caution," particularly "in light of foreign policy concerns." *Id.* at 1664. The Court took the example of the TVPA, explaining that "identifying ... a norm [of international law] is only the beginning of defining a cause of action," *id.* at 1665, and noting that Congress limited the TVPA cause of action by, among other things, "specifying who may be liable," *id.* (citing 28 U.S.C. § 1350 note, § 3).

The Court also referenced "[r]ecent experience" with ATS actions that, "far from avoiding diplomatic strife" as the ATS was designed to do, instead "could have generated it." *Id.* at 1669. The Court cited as

an example Justice Kavanaugh's dissenting opinion in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77-78 (D.C. Cir. 2011), which had noted that numerous foreign sovereigns had strenuously objected to several ATS suits brought against corporations.

B. The Requisite Caution Includes Whether A Party Is An Appropriate Defendant As A Matter Of Federal Common Law

Sosa and *Kiobel II* also make clear that the same judicial caution that this Court has required in defining the substantive and geographic scope of federal common law under the ATS similarly applies to the question whether a particular type of party—such as a corporation—is a proper defendant in such an action.

In *Sosa*, the Court explicitly stated that a "related consideration" to whether an international norm satisfied the test of concrete definition and universal acceptance was "whether international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*, if the defendant is a private actor *such as a corporation* or individual." 542 U.S. at 732 n.20 (emphasis added); *see also id.* at 760 (Breyer, J., concurring) ("The norm [of international law] must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."). And in *Kiobel II*, the Court noted that defining the scope of an international-law-based cause of action includes determining "specifying who may be liable." 133 S. Ct. at 1665. Notably, the Court cited for that proposition § 3 of the TVPA, which limits TVPA actions to suits against "individuals," and thus precludes TVPA suits against corporations. *See Mo-*

hamad v. Palestinian Auth., 132 S. Ct. 1702, 1705-06 (2012); *infra* Section II.B. This Court's ATS precedents, in other words, make clear that courts should not assume that corporations are proper defendants in ATS actions, but instead must determine as a matter of federal common law whether they should be.

That principle is not unique to the ATS, but applies generally to other analogous federal common law causes of action. Indeed, corporations are not subject to liability in the federal common law context most analogous to implied ATS actions: implied actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to enforce constitutional guarantees against federal agents, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *see Sosa*, 542 U.S. at 742-43 (Scalia, J., concurring in judgment). As with the ATS, the Court derives its authority to imply *Bivens* actions from a general grant of jurisdiction. *Malesko*, 534 U.S. at 66. As with the ATS, *Bivens* establishes a tort action meant to enforce fundamental norms, even when Congress has not expressly authorized their enforcement. As with the ATS, this Court exercises "caution" when considering whether to recognize new *Bivens* actions. *Id.* at 74. And as the Court should make clear for the ATS, *Bivens* actions are not available against corporations. *Id.* at 63, 74.

This Court in *Malesko*—exercising its federal common-lawmaking authority—refused to extend *Bivens* liability to corporations, even if they are acting under color of law. *Id.* The Court so held primarily because corporate liability was unnecessary to further *Bivens*'s core purpose to deter individual

federal officers from violating the Constitution, *id.* at 70-71, and because the "caution toward extending *Bivens* remedies into any new context ... foreclose[d] such an extension here," *id.* at 74.

Malesko further demonstrates that corporate liability under federal common law—especially in fraught areas requiring "great caution" (*Sosa*, 542 U.S. at 728; *cf. Malesko*, 534 U.S. at 74)—should not be assumed or implied in every context.

II. THIS COURT SHOULD NOT IMPLY A FEDERAL COMMON LAW CAUSE OF ACTION AGAINST CORPORATIONS FOR VIOLATIONS OF HUMAN-RIGHTS NORMS OF THE SORT ALLEGED HERE

The question, then, is whether this Court *should* imply a federal common law action against corporations for violation of international human-rights norms. The Court should analyze that question, as it has in the past, by (i) considering whether the international law norm invoked is definitively concrete, universally accepted, and reaches the "perpetrator being sued," and if so, (ii) determining whether it would be appropriate to recognize a federal common law cause of action in the circumstances, consistent with this Court's repeated admonitions that such an action is extraordinary and thus warranted in only the rarest of circumstances. *See Sosa*, 542 U.S. at 726-33; *Kiobel II*, 133 S. Ct. at 1664-69. The answer to the question, for several reasons, is no.

First, corporate liability for international human-rights violations is generally not recognized under international law, and federal courts may not ratify

an ATS action that extends beyond what the law of nations has recognized. *Second*, Congress already decided in the TVPA that corporations should *not* be subject to private suit for violation of international human-rights norms. This Court should follow Congress's lead in fashioning federal common law concerning the exact same subject matter. *Third*, the availability of corporate liability in the lower courts has routinely encouraged plaintiffs to file ATS actions that interfere with significant U.S. foreign-policy and economic objectives. Rather than serving the ATS's basic purpose—to provide a federal forum for law-of-nations violations that would help *alleviate* international friction—corporate liability *creates* friction with allies and trading partners. *Fourth*, corporate ATS actions impose significant and unwarranted costs on U.S. corporations operating abroad, and on foreign corporations that invest in the United States.

A. Federal Common Law Under The ATS Should Follow International Law, Which Does Not Recognize Corporate Liability For International Human-Rights Norms

Numerous courts and commentators agree that customary international law does not treat corporate entities (as opposed to the natural persons through whom an entity acts) as having the capacity to violate human rights norms. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 131-45 (2d Cir. 2010) ("*Kiobel I*"); *Doe*, 654 F.3d at 83 (Kavanaugh, J., dissenting in part). Every international criminal tribunal beginning with Nuremberg has extended liability for international human-rights law violations *only to natural persons*. *See Kiobel I*, 621 F.3d

at 132-37. Similarly, the jurisdiction of the International Criminal Court is limited under the Rome Statute to "natural persons." Rome Statute, art. 25(1), July 17, 1998, 37 I.L.M. 1002, 1016.

As the Second Circuit held in *Kiobel I*, the limits of international law suffice to exclude corporations from the ATS's scope. *Sosa*, after all, requires as a prerequisite to recognizing a federal common law cause of action that the plaintiff show that "international law extends the scope of liability ... to the perpetrator being sued." 542 U.S. at 732 n.20. And international law does not extend the scope of liability for international human-rights norms to corporations. Indeed, the nations that ratified the Rome Statute considered and rejected a proposal to extend its substantive provisions to corporations precisely because of the disparity in practice among states. *See Kiobel I*, 621 F.3d at 137. At least absent "legislative guidance," *Sosa*, 542 U.S. at 726, federal courts have no authority to allow a private action to enforce an international norm that international law itself does not universally recognize.

Moreover, even if international law could be construed to extend human-rights norms to corporations, corporate ATS liability would still be inappropriate unless it was consistent with the federal common law principles articulated in *Sosa* and *Kiobel II*. For the reasons explained below, those principles preclude ATS suits against corporate entities.

B. Congress's Policy Judgment Concerning Corporate Liability In The TVPA Should Control The Content Of Federal Common Law Under The ATS

Recognizing corporate ATS liability would squarely contradict *Sosa*'s admonition that "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 726. Here, Congress has made clear its policy judgment, reflected in the TVPA, to preclude private actions against corporations for alleged human-rights violations. Courts must give effect to that judgment when determining the scope of federal common law under the ATS.

Congress enacted the TVPA to provide an express cause of action for torture and extrajudicial killing, but provided liability against only natural persons, not organizations. *See Mohamad*, 132 S. Ct. at 1705-06. Even more so than the limitations imposed by international law, the limits imposed *by Congress* on analogous private actions should guide and limit federal courts in determining the contours of federal common law under the ATS.

The express cause of action made available in the TVPA for torture and extrajudicial killing, 28 U.S.C. § 1350 note, § 2, is directly analogous to the implied action this Court authorized federal courts to recognize under the ATS for violation of international human-rights norms, except that the TVPA applies to both alien- *and* U.S. citizen-plaintiffs. When the TVPA was enacted in 1992, it was still unclear whether any ATS action would be available at all—this Court had not yet resolved the prominent dis-

pute between Judge Edwards and Judge Bork that played out in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), concerning whether the ATS established a cause of action for violation of international norms, *see id.* at 781 (Edwards, J., concurring), or instead merely created jurisdiction and left for later Congresses the decision whether to create explicit causes of action for violation of particular norms, *see id.* at 799 (Bork, J., concurring). The TVPA's legislative history makes clear that the statute was specifically intended to respond to Judge Bork's concerns and provide the express cause of action for torture he believed the ATS required. *See* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 3-4 (1991).

This Court should not imply a federal common law cause of action against corporations for human-rights law violations under the ATS when Congress, in the TVPA, considered and rejected suits against corporations in the very same context. *See Mohamad*, 132 S. Ct. at 1705-06. Often Congress has provided little or no "legislative guidance," *Sosa*, 542 U.S. at 726, so courts must fashion federal common law with their own tools (including precedent, reasoning by analogy, and policy considerations where appropriate), *see, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 508 n.21 (2008). Not so here. Congress enacted an express cause of action directly analogous to the implied action at issue in this case, and Congress chose not to extend that action to corporations. In exercising its authority to develop federal common law, this Court should follow the legislative guidance Congress provided, especially "in exercising a jurisdiction that remained largely in shad-

ow for much of the prior two centuries." *Sosa*, 542 U.S. at 726.

This Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), illustrates the proper approach to federal common-lawmaking in the shadow of congressional action. *Miles* was a general admiralty law case. Like actions under the ATS, actions in admiralty sound in federal common law. *Exxon*, 554 U.S. at 489-90. The question in *Miles* was whether a nondependent parent may recover for loss of society in a general maritime wrongful death action, and whether survival actions for lost future earnings are allowed. 498 U.S. at 23. In answering those questions in the negative, this Court explained that its federal common law rule would be guided by statutory enactments in analogous contexts.

The Court began by describing its prior decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The question there was whether general maritime law recognized wrongful death actions. A nineteenth century decision of this Court had held it does not. *Moragne* reversed that decision, because "state legislatures and Congress had rejected wholesale the rule against wrongful death." *Miles*, 498 U.S. at 23. In particular, the Jones Act and the Death on the High Seas Act ("DOHSA") had both created wrongful death actions, the first for seamen killed in the course of employment, and the second for anyone killed on the high seas. *Id.* at 23-24. The policy in favor of wrongful death actions, the Court explained, "is 'to be given its appropriate weight not only in matters of statutory construction *but also in those of decisional law*,'" because "legislation has always served as an important source of both common

law and admiralty principles." *Id.* at 24 (emphasis added) (quoting *Moragne*, 398 U.S. at 391). Indeed, the Court made clear that an admiralty court making federal common law "should look *primarily* to ... legislative enactments for policy guidance." *Id.* at 27 (emphasis added). A court must keep federal common law rules "strictly within the limits imposed by Congress," the Court explained, *id.*, because positive law does not merely reflect "general policies," but also the "limits" of those policies, which a court making federal common law "is not free to go beyond," *id.* at 24.

Applying the lessons of *Moragne* to the case at hand, *Miles* held that no action for loss of society was available under general maritime law, because the Jones Act did not allow such an action in an analogous context. *Id.* at 32. The Court also held that any income the decedent would have earned but for his death is not recoverable in general maritime law, again following the lead of DOHSA and the Jones Act. *Id.* at 35-36.

As with the Jones Act and DOHSA, Congress has established a clear policy under the TVPA: only natural persons, not corporate entities, may be sued for violating international law norms. That congressional policy determination answers the question presented in this case—the "decisional law" to be made under the ATS (*id.* at 24) must "keep strictly within the limits imposed by Congress" (*id.* at 27).

The TVPA is undeniably analogous—indeed, it overlaps with the ATS, and even occupies the same section of the U.S. Code, 28 U.S.C. § 1350—so the guidance it provides should be given great weight. It

is of no moment that the ATS is silent as to the identity of the defendant, whereas the TVPA applies specifically to "individuals." As *Sosa* held, the ATS itself is solely *jurisdictional*, with substantive aspects of new causes of action to be determined *by courts* applying federal common law. 542 U.S. at 724. And as *Kiobel II* recognized, the TVPA is not only analogous to the federal common law cause of action under the ATS, but the contours of the TVPA cause of action includes "specifying who may be liable." 133 S. Ct. at 1665. When Congress specified who may be liable under the TVPA, it excluded corporations. Federal courts are obliged to follow the course fixed by Congress when it devised a cause of action essentially identical to the cause of action petitioners want the Court to recognize here.

Congress's rejection of corporate liability in the TVPA also compels the same result for federal common law under the ATS because of the policy anomaly that would follow if the Court rejected Congress's guidance. The TVPA applies to both alien- *and* U.S. citizen-plaintiffs. Accordingly, if corporate liability for ATS claims *were* recognized, an intolerable incongruity would arise: aliens (who can sue under the ATS) would be allowed to sue U.S. corporations for alleged acts of torture, while U.S. citizens (who can only sue under the TVPA) could not sue either foreign or U.S. corporations for the exact same conduct. That inexplicable and indefensible policy result is reason enough to construe federal common law concerning corporate liability under the ATS consistent with the policy judgment reflected in the TVPA. *See Miles*, 498 U.S. at 33 (construing federal common

law to avoid "anomaly" and "unwarranted inconsistency" in legal treatment of similar situations).

It is also irrelevant that, while the TVPA provides a statutory cause of action only for certain acts under color of law of a "foreign nation," the ATS was enacted to confer jurisdiction and does not specify the law-of-nations violations that may be actionable. Essentially all modern ATS litigation involves alleged violations of international human-rights norms such as torture. It is not surprising that the TVPA—which was intended to provide an express action under the ATS—involves only torture and extrajudicial killing, since at the time the TVPA was enacted, those were the two dominant human-rights norms that had been alleged in major ATS litigation. *See Filartiga*, 630 F.2d at 880 (torture); *Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring) (torture); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 495 (9th Cir. 1992) (torture and wrongful death). There is no reason to infer from enactment of the TVPA that Congress expected other, similar international human-rights norms to be treated differently by courts creating federal common law under the ATS.

There were also good reasons for Congress to limit the TVPA to individual actions. As discussed immediately below, *see infra* Section II.C, corporate liability for violation of modern human-rights norms creates particular risks to U.S. foreign policy and economic interests, because corporate liability in that context often depends on condemnation of a foreign government's own conduct, and because recognizing corporate liability invites non-meritorious lawsuits and disincentivizes the very foreign invest-

ment U.S. policy often seeks to encourage. Even without Congress's express guidance, these risks should preclude courts from extending federal common law to corporations.

C. Foreign Policy And Practical Concerns Confirm That Federal Common Law Should Not Extend ATS Actions For Human-Rights Violations To Corporations

This Court explained in *Kiobel II* that judicial caution was required in formulating the federal common law cause of action under the ATS in large part "in light of foreign policy concerns." 133 S. Ct. at 1664. And the Court emphasized more generally in *Sosa* that this question also "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 732-33. Recognizing actions against corporations for violation of modern human-rights norms would cause serious, adverse practical consequences for U.S. foreign policy and economic interests.

1. *Corporate Liability Leads To Serious Adverse Foreign Policy Consequences*

All ATS cases necessarily risk causing adverse foreign policy consequences by interfering with the political branches' foreign policy prerogatives. *Sosa*, 542 U.S. at 727-28. Corporate liability exacerbates those adverse foreign policy consequences immeasurably, as the modern era of ATS litigation shows.

a. The ATS was enacted by the First Congress as part of the Judiciary Act of 1789. Despite its vin-

tage, the ATS had very limited significance for nearly two centuries, providing jurisdiction in only two cases before 1980. *See Sosa*, 542 U.S. at 712.

The Second Circuit's opinion in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), initiated the first modern wave of ATS litigation, authorizing "claims by alien plaintiffs against alien individual defendants" who had acted under color of a foreign state's law, Julian Ku, *The Third Wave: The Alien Tort Statute And The War On Terrorism*, 19 Emory Int'l L. Rev. 105, 108 (2005) (hereinafter "Ku, *Third Wave*"). These claims did not appear to cause any serious international friction. *Id.*

Another wave of ATS litigation was unleashed in 1995, when the Second Circuit in *Kadic v. Karădzíc*, 70 F.3d 232 (2d Cir. 1995), held that some norms of international human-rights law actionable under the ATS—like genocide and war crimes—do not require state action. *Id.* at 241-43. Largely in response to *Kadic*, plaintiffs began to bring suit—often in the form of class actions—against private corporations operating in foreign nations.

ATS suits against corporations were significantly different in kind and consequence from the suits against individual state officials brought in *Filartiga*'s wake. Most international norms require state action, and even those that do not are nevertheless usually committed directly by state actors. Thus, to assert corporate liability under the ATS, plaintiffs were compelled to allege theories of secondary liability, where the primary acts were allegedly committed by the foreign government itself. *See, e.g., Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1178 (C.D. Cal.

1998); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542-43, 549 (S.D.N.Y. 2004); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 638-39 (S.D.N.Y. 2006).

Unlike the early post-*Filartiga* suits, the underlying conduct targeted by these suits against corporations was often that of sovereign governments themselves, not individual rogue state actors. This created several sources of friction. First, the new corporate cases required courts to find that a foreign sovereign *itself* violated a universally recognized international law norm, such as torture, war crimes, or genocide. Second, because corporations are more attractive targets than individuals—particularly individuals with no U.S. assets—the volume of such suits increased dramatically through the late 1990s and into the new century. *See* Ku, *Third Wave*, at 109. Third, in many of these cases, the corporations being sued were targeted for doing business in a country with a poor human-rights record—where Congress or the President had often made a policy determination to *favor* business investment in the country, as a means of promoting liberalization and political and social reform.

b. The nature and increased volume of these new corporate actions sparked significant international tension. *See Kiobel II*, 133 S. Ct. at 1669; *Doe*, 654 F.3d at 77 (Kavanaugh, J., dissenting in part). Numerous sovereigns—including close U.S. allies—objected to such extraterritorial suits as interfering with their sovereign rights to regulate their own territory and citizens. *See Doe*, 654 F.3d at 79 n.8 (Kavanaugh, J., dissenting in part). Objections were al-

so heard from the sovereigns whose companies were being sued. *See* Br. for United States as *Amicus Curiae* in Support of Pet'rs ("U.S. *Ntsebeza* Br."), *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (U.S. Feb. 11, 2008), at 19-20. The United States itself routinely filed "Statements of Interest" or *amicus* briefs explaining that continued adjudication of these cases would risk serious foreign policy consequences. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 347 (D.C. Cir. 2007) (statement of interest); *S. African Apartheid Litig.*, 346 F. Supp. 2d at 553 (statement of interest); Br. for United States as *Amicus Curiae*, *Khulumani v. Barclay Nat'l Bank*, No. 05-2141 (2d Cir. Oct. 14, 2005); Br. for United States as *Amicus Curiae*, *Sarei v. Rio Tinto PLC*, No. 02-56256 (9th Cir. May 18, 2007).

c. This new class of ATS suit—with corporations as defendants, often alleged to have aided a foreign sovereign in committing grave human-rights violations—has given rise to serious foreign policy consequences. As the U.S. government itself previously explained, "[c]oncerns for international friction" in this context are at their zenith "when domestic courts purport to sit in judgment over the conduct of the foreign state itself, especially in its own territory." U.S. *Ntsebeza* Br. 14. Recognizing claims in such circumstances compels federal courts "to adjudicate the legality under international law of the conduct of foreign states as to which Congress has conferred sovereign immunity from civil suits." *Id.* at 14-15. And such claims provide "a clear means for effectively circumventing" important restrictions on civil suits against foreign sovereigns. *Id.* at 15. Thus, any claim calling for a U.S. court to pass

judgment on the conduct of foreign sovereigns—as ATS claims against corporations almost invariably do—"poses serious risks to the United States' foreign relations with foreign states." *Id.* at 18.

Moreover, even when such suits do not require U.S. courts to sit in judgment of a foreign sovereign, the U.S. government has emphasized that corporate ATS actions interfere with its ability to use trade-related foreign policy tools—including encouraging or limiting trade—to foster the liberalization of undemocratic regimes. *Id.* at 20-21. The threat of ATS actions against corporations operating abroad creates "uncertainty for those operating in countries where abuses might occur," and thus has "a deterrent effect on the free flow of trade and investment." *Id.* at 20. By "hinder[ing] global investment in developing economies, where it is most needed," extraterritorial ATS litigation against corporations "inhibit[s] efforts by the international community to encourage positive changes in developing countries." *Id.* (quoting letter from United Kingdom, joined by Germany, to the U.S. State Department). Constructive engagement by private corporations often represents the only means by which many such countries can hope to achieve economic growth and eventual political stabilization. *See* World Bank, *Swimming Against The Tide: How Developing Countries Are Coping With The Global Crisis* 6-7 (2009).[2] ATS suits against private companies discourage that es-

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[2] http://documents.worldbank.org/curated/en/356541468331171678/pdf/477800WP0swimm10Box338866B01PUBLIC1.pdf.

sential investment and weaken the prospects for the development of stable political institutions.

Indeed, many recent ATS suits amount to bids to block corporations from investing in, or doing business in, countries with poor human rights records and are the equivalent of attempts "to impose embargos or international sanctions through civil actions in United States courts." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009); *see also id.* at 261 (plaintiffs' allegations "serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan"). Such quasi-sanctions are particularly harmful not only because of their economic effects, but also because they "interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence." U.S. *Ntsebeza* Br. 15.

d. These adverse foreign policy consequences suffice in their own right to preclude implying an action against corporations for violation of international human-rights norms under federal common law. But they provide especially compelling reasons to reject corporate liability in the particular context of federal common law *under the ATS*, because such consequences would undermine the very purpose of that statute. *See Malesko*, 534 U.S. at 70-71 (refusing to extend *Bivens* action to corporations because doing so would not further purpose of such actions).

As *Sosa* explained, the ATS was enacted by the First Congress because of anxiety on the part of the Continental Congress that the courts of the states,

during the period of the Articles of Confederation, were not sufficiently open to complaints of international law violations—and in particular, assaults against foreign ambassadors. Congress believed that a federal forum was needed to vindicate law-of-nations violations, in order to mitigate the international friction that stems from such international incidents. 542 U.S. at 715-18.

Creating corporate liability for actions under the ATS has had an effect opposite from what the statute's framers intended. Rather than mitigating international friction, lower courts' authorizing ATS suits against corporations "could have generated it." *Kiobel II*, 133 S. Ct. at 1669; *see supra* at 26-28. If extending litigation under the ATS to corporations is considered necessary to serve whatever policy objectives are reflected in the ATS's jurisdictional language, it is the task of Congress, not the federal courts, to make that determination.

2. *Corporate ATS Liability Imposes Unwarranted Costs On Businesses Operating Abroad*

Corporate ATS suits not only impermissibly interfere with the foreign policy prerogatives of the political branches, but also impose unwarranted costs on corporations doing business abroad.

a. Corporate ATS litigation imposes significant, unjustifiable costs on legitimate businesses operating abroad. *E.g.*, Br. as *Amicus Curiae* of Chamber of Commerce of the United States ("*Rio Tinto* Chamber Br."), *Rio Tinto v. Sarei*, No. 11-649 (U.S. Dec. 28, 2011), at 5-14. For example, the purely reputational harms associated with the mere filing of such suits—which are often based on nothing more than

information and belief—can be severe. An ATS complaint can cause a drop in the defendant's stock price, force an undue settlement, or cost a defendant millions in litigation costs—regardless of the merits of the case itself. *Id.* at 8-9. And defense costs are especially high in such cases given the foreign conduct at issue, the difficulties or impossibilities of taking discovery in the foreign country, the 10-year statute-of-limitations that has been permitted in such suits, the complexity of the legal issues involved, and the fractured and often contradictory court opinions on the rules governing ATS cases. *Id.* at 5-14.

Indeed, defending even utterly non-meritorious ATS cases can take more than a decade, because courts often find it difficult to resolve even threshold legal questions. For example, the *Bauman* case against Daimler was pending for 10 years before this Court reversed the Ninth Circuit's expansive jurisdictional holding; a case against Occidental Petroleum was pending for 12 years before its dismissal; Chevron defended an ATS case for 13 years; and Rio Tinto likewise had to litigate for 13 years before the ATS suit against it was dismissed as a matter of law.

The prospect of lengthy and costly litigation, combined with the stigma associated with allegations of human rights violations, make ATS suits particularly effective vehicles to extract settlements from corporate "deep pockets" even in meritless actions. *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009); *see also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d

254, 295 (2d Cir. 2007) (Korman, J., dissenting) (characterizing South Africa Apartheid litigation as a "vehicle to coerce a settlement").

Plaintiffs' lawyers have not hesitated to exploit these various costs. For example, two suits were filed in 2001 and 2002 against Coca-Cola and Drummond Co., claiming that the companies were allegedly complicit in human-rights violations in Colombia. *See Sinaltrainal v. Coca-Cola Co.*, No. 1:01-3208 (S.D. Fla. July 20, 2001); *Rodriguez v. Drummond Co.*, No. 7:02-cv-00665 (N.D. Ala. Mar. 14, 2002). Coca-Cola's shares plummeted, in part in light of concerns over the ATS litigation. *See* Joshua Kurlantzick, *Taking Multinationals To Court: How The Alien Tort Act Promotes Human Rights*, 21 World Pol'y J. 60, 63-64 (2004). Plaintiffs' counsel publicly stated that they were "not in a hurry for the cases to be resolved, because as long as they stay tied up in the courts they will continue to receive attention in the media"—for defendants, ATS suits were "public relations disasters waiting to happen."[3] Advocacy groups called for boycotts of Coke products.[4] And a Danish energy company suspended coal purchases from Drummond. *See* Mike Cooper, *Danish Energy Firm Will Stop Buying from Drummond, Pending Court Case*, Platts Coal Outlook, Nov. 27, 2006, at 6, 2006 WLNR 21355024. Years later, the

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[3] Malcolm Fairbrother, Ctr. for Latin Am. Stud., Univ. of Cal., Berkeley, http://clasarchive.berkeley.edu/Events/spring2002/index.html (describing speech by plaintiffs' attorney Daniel Kovalik, entitled Colombia, Human Rights, and U.S. Courts (Apr. 25, 2002)).

[4] *See generally* http://www.killercoke.org.

Coca-Cola suit was dismissed, *see Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006), *aff'd in part, rev'd in part*, 578 F.3d 1252 (11th Cir. 2009), and a jury rejected all the claims against Drummond, *see* Kyle Whitmire, *Alabama Company Is Exonerated in Murders at Colombian Mine*, N.Y. Times (July 27, 2007), at C2; *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (affirming jury verdict). That was far too late, however, to prevent the reputational harms and massive litigation costs the companies had already incurred.

Plaintiffs' lawyers employed a similar strategy against Unocal Corporation based on its alleged activities in Burma. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted, appeal dismissed, and district court op. vacated*, 403 F.3d 708 (9th Cir. 2005). The district court dismissed the ATS claims, but a panel of the Ninth Circuit reversed, and the court granted rehearing *en banc*. *See id.* The case subsequently settled for undisclosed terms—but not before the lawsuit damaged the company's "stock valuation and debt ratings." Kurlantzick, 21 World Pol'y J. at 63; *see also* Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809-10 (2005) (discussing Unocal settlement). Comparable tactics were used against the Royal Dutch Petroleum Corporation in the Second Circuit, again resulting in a settlement. *See* Jad Mouawad, *Shell to Pay $15.5*

Million to Settle Nigerian Case, N.Y. Times (June 9, 2009).[5]

Doe v. Nestle, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010), provides a more recent example. There, the plaintiffs alleged that they were forced to act as slaves on cocoa farms in Côte d'Ivoire. The imprisonment and abuse allegedly was inflicted by Ivoirian cocoa farmers. The plaintiffs did not seek damages from the farmers, however. They instead sued three multinational companies that purchase cocoa from Côte d'Ivoire—Nestlé U.S.A.; Cargill, Inc.; and Archer Daniels Midland Co.—on the theory that they aided and abetted the farmers' human-rights violations. First Am. Compl., *Doe v. Nestle, S.A.*, No. 2:05-CV-05133 (C.D. Cal. July 22, 2009). The district court eventually held in multiple rulings that the plaintiffs' allegations failed to make out a claim of aiding and abetting liability and failed to allege a claim that touched and concerned the United States. 748 F. Supp. 2d at 1109-11; Order, *Doe v. Nestle, S.A.*, No. 2:05-CV-05133, Dkt. No. 249 (C.D. Cal. Mar. 2, 2017). But these decisions occurred only years after the complaint was filed, and following multiple rounds of briefing, and the case remains pending in the Ninth Circuit. *See Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014); *Doe v. Nestle, S.A.*, No. 17-55435 (9th Cir.) (appeal pending). Moreover, the pendency of the lawsuit has been used to try to subject the defendants to reputational and financial harm. For example, press releases and demonstrations just before Halloween and Valen-

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[5] http://www.nytimes.com/2009/06/09/business/global/09shell.html.

tine's Day urged parents and children to refuse to purchase chocolate candy because it was allegedly the product of "child slavery"—with the pending ATS action cited as support for that claim.[6]

These examples are not unique. Over the past two decades, various sets of plaintiffs have brought over 150 ATS suits against U.S. and foreign corporations in more than 20 industry sectors, targeting business activities in over 60 countries, including countries that are close U.S. allies. *See Rio Tinto* Chamber Br. 6-7. If corporate liability persists, these suits—and the tremendous costs they impose both on U.S. corporations, and on foreign corporations that seek to invest in the United States—promise to continue.

b. The significant and unwarranted costs associated with corporate ATS litigation provide a further reason to preclude such litigation as a matter of federal common law. This Court has observed that private class actions under the federal securities laws "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). This Court has not hesitated, in such contexts, to narrow the scope of implied causes of action. For example, this Court

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[6] *See, e.g.*, Deborah Orr, *Slave Chocolate?*, Forbes (Apr. 24, 2006), http://www.forbes.com/forbes/2006/0424/096.html; Margot Roosevelt, *Guilt-Free Valentines?*, Time (Feb. 5, 2006); Jennifer O'Connor, *The Virtuous Valentine's Guide: How to be Good to Your Sweetie—and the Rest of the World—on February 14*, This Magazine (Jan. 1, 2007), http://laborrights.org/in-the-news/virtuous-valentines-guide-how-be-good-your-sweetie-and-rest-world-february-14.

has been reluctant to extend the scope of the action implied from § 10(b) of the 1934 Exchange Act, in large part based on the inordinate costs such actions impose on defendants. *See, e.g., id.* at 737 (noting that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-65 (2008) (refusing to extend § 10(b) actions for similar reasons). That result applies a fortiori to private claims under the ATS—the mere filing of one of these lawsuits can exact a significant economic and reputational toll. *See supra* at 30-34.

These effects, moreover, not only harm individual companies, but also the domestic economy as a whole, by discouraging foreign investment in the United States, potentially costing the domestic economy jobs. Foreign companies often invest in the United States by establishing a business presence here. But that step may subject a company, and its assets, to the jurisdiction of U.S. courts—including to ATS claims arising out of conduct occurring elsewhere. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) ("continuous and systematic" general business contacts can suffice to subject foreign companies to the general jurisdiction of U.S. courts). The most obvious way for those companies to avoid ATS litigation is to invest their resources outside the United States. This Court has routinely rejected doctrines discouraging such investment. *See, e.g., id.* at 927-28; *Stoneridge*, 552 U.S. at 163-64. The same principle requires rejecting corporate ATS liability.

Moreover, the action available under the ATS is wholly a creature of federal common law, and an extraordinary one at that, with repeated admonitions from this Court to exercise significant caution before expanding the action's scope. *See Kiobel II*, 133 S. Ct. at 1664; *Sosa*, 542 U.S. at 724-28. Because ATS actions are implied by courts, they must be particularly wary of its associated costs. *See Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 269-72 (2d Cir. 2011) (Jacobs, J., concurring in denial of panel reh'g).

The foreign policy and other practical consequences of corporate ATS actions compel only one sensible result: federal common law actions under the ATS for violation of international human-rights norms should be limited to actions against natural persons—the same determination the international community has made under customary international law, and that Congress made in the TVPA.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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